82-2060

No. _____

Office-Supreme Court, U.S.
FILED
JUN 15 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

FIDELITY CONSTRUCTION COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Equal Access to Justice Act allowing recovery of legal fees and expenses by parties who prevail against the United States applies to qualified claimants who prevail in adversary adjudications before the Federal administrative agency Boards of Contract Appeals pursuant to the Contract Disputes Act of 1978.

2. Whether Section 12 of the Contract Disputes Act of 1978 permits contractors to recover interest on amounts found due on their claims from the date the claim is submitted to the contracting officer.

TABLE OF CONTENTS

Opinions Below. 2

Jurisdiction. 2

Questions Presented 3

Statutes Involved 3

Statement of the Case 5

Reasons for Allowance of the Writ 14

I. The Decision of the Court of Appeals Denying Boards the Right to Award Legal Fees in Appropriate Cases Destroys the Parallel Jurisdiction That Congress Intended under the Contract Disputes Act of 1978. 14

II. The Minority of the Court Below Stated the Correct Rule That Congress Intended Interest to Run from the Date a Claim Was Filed 22

Conclusion. 25

Appendix A

Fidelity Construction Co. v. *U.S.*, 700 F.2d 1379 (February 18, 1983)

Appendix B

Order of the Court of Appeals denying rehearing *en banc* March 17, 1983

Appendix C

Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. §605)

TABLE OF AUTHORITIES

Cases

B&E Mail Transport, Inc.
PSBCA Nos. 971, 972, 83-1 BCA ¶16,225. . . . . 11n

Brand S. Roofing
ASBCA No. 24688, 82-2 BCA ¶15,717. . . . . 12n, 18n

Jack Faucett Assoc., Inc.
GSBCA No. 5443-R, 81-1 BCA ¶14,936 . . . . . 12n

August Gava v. *U.S.*
699 F.2d 1367 (Fed. Cir. 1983) 9

Kay Manufacturing Company v. *U.S.*
699 F.2d 1376 (Fed. Cir. 1983) 9

Paul E. Lehman, Inc. v. *U.S.*
230 Ct.Cl. ____, 673 F.2d 352 (1982) 23

Albert Maturo
PSBCA No. 1029, 82-2 BCA ¶_____ 11n

Stephens Associates
PSBCA No. 933, 82-2 BCA ¶16,043;
83-1 BCA ¶16,224 . . . . . 11n, 12n, 18n

T. H. Taylor, Inc.
ASBCA No. 26494-0, 83-1 BCA ¶_____. 11n

U.S. v. *Greathouse*
166 U.S. 601 (1897). 20, 21

U.S. v. *Jones*
131 U.S. 1 (1889). 20, 21

U.S. v. *N.Y. Rayon Importing Company, Inc.*
329 U.S. 654 (1947). 23

Claude C. Wood Co.
AGBCA 79-176-1, 82-2 BCA ¶15,999 . . . . . 12n, 18n

Statutes

Contract Disputes Act of 1978
Pub.L. 95-653, 92 Stat. 2385,
41 U.S.C. §601 *et seq*. 4

Equal Access to Justice Act
Pub.L. 96-481, 94 Stat. 2325
amending 5 U.S.C. §504(a)(1) and
28 U.S.C. 2412(d)(1) 3

Federal Courts Improvement Act
Pub.L. No. 97-164, 96 Stat. 25 . . . . . 14n

Tucker Act
24 Stat. 505, 28 U.S.C. §1491 20

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Fidelity Construction Company respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Federal Circuit (CAFC) in Appeal No. 27-82, entered February 18, 1983, motion for reconsideration *en banc* denied March 17, 1983.

OPINIONS BELOW

The judgment of the CAFC dated February 18, 1983 is reported at 700 F.2d 1379, a copy of which is appended hereto as Appendix A. The CAFC's denial of the motion for reconsideration *en banc* dated March 17, 1983 is attached hereto as Appendix B. The judgment of the CAFC affirmed the refusal of the Department of Transportation Contract Appeals Board (the "Board") to grant Petitioner legal fees and expenses under the Equal Access to Justice Act (EAJA), notwithstanding the fact that Petitioner prevailed at the Board in a contract dispute with the Federal Aviation Administration. The Board's ruling, issued February 11, 1982 in DOTCAB Dockets 1113 and 1219, and reported at 82-1 BCA ¶15,633, did not reach the issue of the Board's jurisdiction under the EAJA as addressed by the CAFC, and is not appended to this petition.

JURISDICTION

The judgment of the CAFC was entered on February 18, 1983 (Appendix A). A timely motion for reconsideration *en banc* was filed on March 4, 1983, and the same was denied without further opinion on March 17, 1983 (Appendix B). This

Court has jurisdiction to review the judgment below by writ of certiorari under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the Equal Access to Justice Act allowing recovery of legal fees and expenses by parties who prevail against the United States applies to qualified claimants who prevail in adversary adjudications before the Federal administrative agency Boards of Contract Appeals pursuant to the Contract Disputes Act of 1978.

2. Whether Section 12 of the Contract Disputes Act of 1978 permits contractors to recover interest on amounts found due on their claims from the date the claim is submitted to the contracting officer.

STATUTES INVOLVED

The Equal Access to Justice Act, Pub.L. 96-481, 94 Stat. 2325 provides at 5 U.S.C. §504(a)(1) that:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency

> finds that the position of the agency as party to the proceeding was substantially justified ---

The EAJA also amended 28 U.S.C. 2412(d)(1) to now read:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses --- incurred by that party in any civil action --- brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified ---

This latter language providing EAJA relief in court proceedings is important because it was enacted in light of prior statements by Congress concerning relief that would be available to contractors under the Contract Disputes Act of 1978 (CDA), Pub.L. 95-653, 92 Stat. 2383, 41 U.S.C. §601 *et seq.* which stated:

> Each agency board shall have jurisdition to decide any appeal from a contracting officer --- In exercising this jurisdiction, *the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims.* (Emphasis added.)

The CDA also provides for payment of interest on contractors' claims, stating at 41 U.S.C. §611 that:

> Interest on amounts found due contractors on claims shall be paid to the contractors from the date the contracting officer receives the claim pursuant to section 6(a) [41 U.S.C. §605(a)] from the contractor until payment thereof.

The sections of the CDA that are cross-referenced in the above passage are set forth in full in Appendix C, attached hereto.

STATEMENT OF THE CASE

Petitioner Fidelity Construction Company, a small family-owned business located in Fredericksburg, Virginia, successfully litigated a contract claim against the Federal Aviation Administration (FAA) for increased costs arising out of a contract to install an experimental signal light system at Bradley International Airport in Windsor Locks, Connecticut. The claim, first filed in October 1979 in the amount of some $238,000, was summarily rejected by the FAA in November 1979, amid accusations that it was fraudulently submitted. Upon the FAA's refusal even to discuss the claim, Petitioner was forced to retain counsel and appeal to the Department of Transpor-

tation Contract Appeals Board under the procedures provided by the Contract Disputes Act of 1978. After considerable further foot-dragging by the FAA--including several unsuccessful attempts to have the appeal dismissed or at least indefinitely postponed because of the alleged fraud--Petitioner was able to bring the matter to hearing during February 1981, and ultimately prevailed on 20 of 23 claim items, for which the Board in February 1982 awarded over $202,000 in monetary relief. The litigation, however, had stretched out more than 28 months and had forced Petitioner to incur over $42,404 in legal fees and expenses to vindicate its rights against the Government, including finally convincing the FAA in March 1982 to drop its spurious charges of fraud and at last pay Petitioner the amounts the Board found due on its claim.

Although Petitioner believed that many aspects of the FAA's conduct throughout the dispute constituted bad faith, Petitioner made no attempts to recover its litigation costs on that basis, inasmuch as Congress had provided a new remedy under the Equal Access to Justice Act which became effective on October 1, 1981 and applied to all cases pending as of that date. Accordingly, in its final pleading at the Board dated October 30, 1981, Petitioner requested that

the Board grant Petitioner the legal fees and expenses incurred in the appeal, appending actual copies of the amounts billed by counsel to date, and requesting that the Board make such findings as are mandated by the EAJA concerning whether the Government's position throughout the dispute was "substantially justified." The Board, however, declined, reasoning instead that Petitioner was seeking fees and expenses incurred for the period prior to October 1, 1981, and that the EAJA should not be retroactively applied. The Board took no position on whether it had jurisdiction to award EAJA relief for the period subsequent to the effective date of the Act. 82-1 BCA §15,633 at 77,229.

In its October 30, 1981 pleading, Petitioner likewise had requested that the Board award interest under Section 12 of the CDA on the amounts found due on its claim from the date it was first submitted in writing to the FAA's contracting officer (October 26, 1979) through the date of payment. The Board, however, refused to recognize that starting date, instead adopting the later date of May 29, 1980, which coincided with the date the claim was first "certified" pursuant to Section 6(c) of the CDA. 82-1 BCA §15,633 at 77,226. The Board's shortening of the period for the running of interest deprived Petitioner of

some $11,210 in recovery of interest on its claim.

Following the Board's final decision of February 11, 1982, Petitioner filed a timely appeal at the then-designated Court of Claims, seeking review of the Board's rulings on both interest and legal fees. During the pendency of the appeal, a number of other Boards of Contract Appeals affirmatively held that they did have jurisdiction to award EAJA relief,[1/] and proceeded to do so in appropriate cases.[2/] Petitioner filed its opening brief with the Court of Claims on July 7, 1982, arguing with respect to the legal fees issue that the Board below erred in ruling that the EAJA did not cover fees incurred on pending cases prior to October 1, 1981. In its reply brief dated September 30, 1982, the Department of Justice raised for the first time the issue of whether the DOTCAB, or any of the various agency Boards of Contract Appeals, had jurisdiction to award legal fees and expenses under the EAJA. Petitioner addressed that question of first impression in its closing brief dated October 22, 1982. Oral argument was

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1. See below at Note 9.

2. See below at Note 8.

heard by the newly-constituted Court of Appeals for the Federal Circuit (CAFC) on December 6, 1982, along with the cases of *August Gava* v. *U.S.*, 699 F.2d 1367 and *Kay Manufacturing Co.* v. *U.S.*, 699 F.2d 1376, both of which presented the issue of retroactive application of the EAJA but did not involve appeals from an agency Board of Contract Appeals.

On February 18, 1983, the CAFC ruled that the EAJA, as a waiver of sovereign immunity, must be strictly construed,[3] and that since Congress had not expressly stated that agency Boards of Contract Appeals were to be covered, no such intent could be implied.[4] Ironically, on the same date the CAFC in *Kay Manufacturing Co.* v. *U.S.*[5] held that the EAJA does apply in pending cases retroactively to cover legal fees and expenses incurred prior to October 1, 1981, thus in effect sustaining Petitioner's position on one of the two issues which Petitioner had appealed. On the interest issue, however, the majority of the CAFC ruled that the certification provisions of Section 6(c) of the CDA[6] must be read into

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3. Appendix A, at A11

4. Appendix A, at A15

5. 699 F.2d 1376, at 1378.

6. 41 U.S.C. §605(c), reprinted as Appendix C.

Section 12 as an absolute prerequisite before interest may be paid, thereby siding with the Board's conclusion that interest here could run only from May 29, 1980. In a strong dissent, Judge Baldwin argued that Section 12 should be literally applied as unambiguously drafted by Congress to allow contractors interest on their claims from the date first submitted in writing to the contracting officer.[7/]

By motion for rehearing *en banc* timely filed on March 4, 1983, Petitioner attempted to point out to the CAFC the havoc its denial of EAJA jurisdiction for the agency Boards of Contract Appeals would have on the plight of individual and Small Business contractors seeking relief from the Government under the CDA. Indeed, Petitioner informed the CAFC that as of February 18, 1983 there had been at least 44 other contract cases filed with the 12 agency Boards in which

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7. Appendix A, at A16.

fees had been requested,[8/] and that each of the Boards that had considered the issue had unanimously ruled that they did in fact have jurisdic-

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8. When this case was submitted to the CAFC following oral argument on December 6, 1982, no Board had actually awarded relief under the EAJA. On November 16, 1982, the Postal Service Board ruled that it had jurisdiction under the EAJA, but that no fees or expenses were to be awarded under the particular facts in *Albert Maturo*, PSBCA No. 1029, 82-2 BCA ¶_____. On January 12, 1983, the Postal Service Board did award fees in the second *Stephens Associates* case, 83-1 BCA ¶16,224, a copy of which Petitioner furnished to the CAFC on January 25, 1983. On January 20, 1983, the Postal Service Board awarded fees and expenses in *B&E Mail Transport, Inc.*, PSBCA Nos. 971, 972, 83-1 BCA ¶16,225. On February 3, 1983, the Armed Services Board awarded fees and expenses in the amount of $13,334.45 in *T. H. Taylor, Inc.*, ASBCA No. 26494-0, 83-1 BCA ¶_____. Petitioner appended a copy of that slip opinion to its motion for reconsideration *en banc* in direct response to the CAFC's statement in its February 18, 1983 opinion (Appendix A, at A14) that it was aware of no Board decision awarding EAJA relief following the Federal Courts Improvement Act of 1982 (see below at Note 12). Following receipt of the adverse ruling in the instant case, Petitioner made an informal telephone survey of the number and status of EAJA cases that had been filed at each of the 12 agency Boards. The results of the survey were attached to its motion for reconsideration *en banc*, but may be summarized as follows: Of the four Boards that had con-

tion to award EAJA relief.[9] Finally, Petitioner strenuously argued that the CAFC's ruling that EAJA relief was not available at the Boards would seriously undercut the parallel remedies that Congress had intended to provide at both the Boards and the Court of Claims when it enacted the CDA, to say nothing of the fact that the ruling would leave totally without a legal remedy

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8. (Footnote continued from previous page) sidered the issue, all had concluded they have EAJA jurisdiction. With the exception of HUD and Energy (which did not furnish statistics at all), each Board as of February 18, 1983 had received at least one EAJA application, and one Board (ASBCA) had received twenty-one. All Boards reported that contractors were aware of the EAJA remedy and that many more applications for fees and expenses could be expected as soon as the merits of the underlying claim were resolved. Of the 44 applications that had been filed to date, final decision or other disposition had been rendered in 11 cases.

9. During the pendency of Petitioner's appeal to the CAFC, four agency Boards of Contract Appeals issued opinions holding that they possessed authority to grant EAJA relief. The initial cases reaching this conclusion were as follows: Agriculture: *Claude C. Wood Co.*, AGBCA 79-176-1, 82-2 BCA ¶15,999; Armed Services: *Brand S. Roofing*, ASBCA No. 24688, 82-2 BCA ¶15,717, on recon. 82-1 BCA ¶15,935; GSA: *Jack Faucett Assoc., Inc.*, GSBCA No. 5443-R, 81-1 BCA ¶14,936 (*dicta*); Postal Service: *Stephens Associates*, PSBCA No. 933, 82-2 BCA ¶16,043, 83-1 BCA ¶16,224.

the perhaps hundreds[10/] of small contractors who had irrevocably elected to invoke the Board's jurisdiction upon the now-thwarted expectation that the administrative remedies there would be the same as those available at the Court, including the recovery of legal fees and expenses in appropriate cases.

Petitioner likewise moved for reconsideration *en banc* of the CAFC's ruling on interest, pointing out the obvious inconsistency in the majority's willingness to read into the interest statute the certification requirements which it expressly does not contain while at the same time denying EAJA relief at the Boards on the grounds that the latter statute must be strictly and literally construed.

On March 17, 1983, the CAFC rejected Petitioner's motion without further opinion,[11/] and Petitioner has proceeded to this Court.

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10. The EAJA requires successful litigants to apply for legal fees and expenses within 30 days of the final decision on the merits. Petitioner was informed by the chief administrative law judge or the recorder of the various agency Boards that a significant number of EAJA applications were expected to be filed by contractors at the Boards once their claims were resolved on the merits. See above at Note 8.

11. Appendix B.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE COURT OF APPEALS DENYING BOARDS THE RIGHT TO AWARD LEGAL FEES IN APPROPRIATE CASES DESTROYS THE PARALLEL JURISDICTION THAT CONGRESS INTENDED UNDER THE CONTRACT DISPUTES ACT OF 1978.

This case presents the important question of how to harmonize the remedies Congress afforded to Government contractors under the Contract Disputes Act of 1978 (CDA) with the remedial purposes of the Equal Access to Justice Act Congress passed just two years later. The error of the court below was to interpret the EAJA so restrictively that it not only thwarts the enlightened intent of that recent legislation, but also effectively destroys the careful balance of alternative remedies that Congress provided to Government contractors earlier in the CDA.

In Section 8(d) of the CDA, Congress stated that the various agency Boards of Contract Appeals may grant contractors "any relief" that would be available in the then-designated Court of Claims.[12/] Indeed, the architects of the CDA had expressly noted that the Boards and the Court

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12. As of October 1, 1982, the Court of Claims was abolished and its functions assigned in part to the CAFC and in part to the new Federal Claims Court under Pub.L. No. 97-164,

would have "parallel jurisdiction" for hearing contract claims,[13] although it was contemplated most litigants would elect Board proceedings as the most expeditious and least expensive forum for appealing adverse decisions of the contracting officer. The Senate report accompanying the CDA explained:

> It is expected that better than 90 percent of contract claims will continue to be handled in the agency boards since they should be the *least expensive, most expeditious forum available to the contractor.*[14]
>
> * * *
>
> *The contractor should feel that he is able to obtain his "day in court" at the agency boards and at the same time have saved time and money through the agency board process.* If this is not so, then contractors would elect to go directly to court and bypass the boards since there would be no advantage in

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12. (Footnote continued from previous page) 96 Stat. 25, the so-called Federal Courts Improvement Act of 1982 (FCIA). For purposes of the CDA, it is to the new Federal Claims Court that contractors may appeal adverse decisions of the contracting officer.

13. S.Rep. No. 95-1118, 95th Cong., 2nd Sess., *reprinted* at 1978 U.S. Code Cong. and Ad. News 5235, 5236, and 5240.

14. *id.*, 5246 (emphasis added).

> choosing the agency board route for appeals. *The process by which agency board proceedings take place should be of sufficient positive value in time and monetary savings that contractors would elect to take their appeals to the agency boards.*15/

The costs of legal fees and expenses in asserting a contract claim are not insignificant, as Petitioner has certainly discovered in this case. Prior to the enactment of the EAJA, recovery of these costs against the Federal Government was not available to contractors either under the terms of their contracts, nor generally as an element of recovery at the Boards or the Court of Claims. In this regard, the jurisdiction of both forums was parallel.

In enacting the EAJA, however, Congress expressly waived sovereign immunity from claims for legal fees and expenses in appropriate cases.16/ Indeed, the architects of the EAJA expressly noted that giving citizens some relief from the costs of litigation would permit them better access to the courts or administrative forums to vindicate their rights. The Senate report ob-

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15. *id.*, 5259 (emphasis added).

16. The CAFC below conceded that the EAJA was a waiver of sovereign immunity. See Appendix A, at All.

served that:

> For many citizens, *the costs of securing vindication of their rights and the inability of recover attorney fees preclude resort to the adjudicatory process*. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.17/

* * *

> Providing an award of fees to a prevailing party represents one way to improve citizens access to courts and administrative proceedings. *When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment*. Thus, by allowing an award of reasonable fees and expenses against the Government when its action is not substantially justified, *S. 265 provides individuals an effective legal or administrative remedy where none now exists*. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation.18/

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17. H.Rep. No. 96-1418, 96th Cong., 2nd Sess. (September 26, 1980) at 9, *reprinted in* 1980 U.S. Code Cong. and Ad. News, at 9988 (emphasis added).

18. *Op. cit.*, at 4991 (emphasis added).

The CAFC below, however, ignored these broad purposes of the EAJA and held that it applied only to Court actions under the CDA and not to matters arising at the Boards of the administrative agencies.[19] The CAFC appears to have reached this result principally because it could find no express language in the EAJA naming the Boards as covered by the Act.[20] But the simple answer is that no such express language is needed, since Congress had already clearly spoken when it enacted the CDA, and particularly Section 8(d) which expressly stated that Boards could award the same relief on contract claims as the Court itself.[21]

In short, the CAFC failed to interpret the EAJA consistent with the statutory scheme Congress had already announced in the CDA. As persuasively reasoned by the Boards themselves,[22]

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19. Appendix A, at A10.

20. Appendix A, at A11, A13, and A15.

21. 41 U.S.C. §607(d).

22. *Brand S. Roofing*, 82-1 BCA ¶15,717, pp. 77,752-4; *Claude C. Wood Company*, 82-2 BCA ¶15,999, pp. 79,318-20; *Stevens Associates*, 82-2 BCA ¶16,043, pp. 79,485-7; *T. H. Taylor, Inc.*, ASBCA No. 26494-0 (February 3, 1983), Slip Op. 1-2.

there is no basis to suppose Congress in passing the EAJA had intended to repeal Section 8(d) of the CDA, or to preclude the flow down to the Boards through that conduit of the new statutory remedy authorized by the EAJA. If Congress had so intended to destroy the parallel remedies afforded by the Boards, or to limit certain causes of action only to the Court, it certainly knew how to do so,[23/] but did not. At the very least, there is no basis to conclude that the mere absence of an express reference to the Boards of Contract Appeals in the EAJA should be read as any implication that Congress intended that the parallel jurisdiction the Boards enjoyed under the CDA was intended to be denied them under the EAJA.

The CAFC below argued that the EAJA must be "strictly construed" because it represents a waiver of sovereign immunity.[24/] What the CAFC

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23. That Congress was well aware of the flow down provisions of Section 8(d) is demonstrated by the fact that in enacting the Federal Courts Improvement Act of 1982 (see above at note 12) Congress expressly restricted the grant of certain equitable powers to the new Federal Claims Court so that they would not be deemed to apply to the Boards of Contract Appeals. See Senate Report No. 97-275 (November 18, 1981) and Report of the House Judiciary Committee on H.R. 4482 (November 4, 1981).

24. Appendix A, at All.

ignored is that, once waiver is found, the EAJA should then be reasonably applied in a manner that furthers, rather than frustrates, its remedial purposes. Instead, the CAFC below dragged along its restrictive notions of sovereign immunity when it turned to consider the scope of the EAJA, and whether it should be considered to "flow down" to the administrative agency Boards through the CDA. The CAFC feels compelled to reach this result on the basis of *U.S.* v. *Jones*.[25] But research reveals that even that case does not require that a statute waiving sovereign immunity be read so literally as to thwart the will of Congress, particularly where to do so would be to repeal by implication another statute through which Congress had already clearly spoken.

Thus, in *U.S.* v. *Greathouse*[26] at issue was whether the six-year limitation on suits against the United States set forth in the Tucker Act[27] had completely displaced earlier statutory language that provided a three-year extension for periods when plaintiffs were legally disabled or

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25. 131 U.S. 1 (1889)

26. 166 U.S. 601 (1897).

27. 24 Stat. 505, now codified as 28 U.S.C. §1491.

overseas. Citing *U.S.* v. *Jones* for the general proposition that grants of jurisdiction against the sovereign should be strictly construed, Justice Harlan nevertheless went on to note that:

> The act of 1887 only superceded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended... to cover the whole subject of limitation of suits against the government, in whatever court instituted. But we cannot suppose it was intended to strike down the exceptions made in U.S. Rev. Stat. §1069... *Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication.* But repeals by implication are not favored, and *when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them.*28/

The rationale of the Court in *U.S.* v. *Greathouse* requires that the CAFC's ruling below be reversed. The error of the CAFC here was its failure to recognize that the provisions of the EAJA and CDA deal with the same subject matter--the remedies of citizens against their Government--and should therefore be harmonized

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28. 166 U.S. 601, at 605 (emphasis added).

if at all possible. The ruling of the CAFC below not only does not read the two acts consistently as expressing a common purpose; it in effect repeals Section 8(d) of the CDA by implication since it holds that Boards cannot provide the same relief as can the Federal Claims Court. If permitted to stand, the CAFC's ruling will not only thwart the clear intent of Congress to protect individual and Small Business litigants who seek redress of disputes at the agency level,[29] but it will also compel these same parties to bring their contract grievances to the more expensive Federal Claims Court,[30] flooding that forum with cases and destroying the balance of alternative remedies Congress mandated in the CDA.

II. THE MINORITY OF THE COURT BELOW STATED THE CORRECT RULE THAT CONGRESS INTENDED INTEREST TO RUN FROM THE DATE A CLAIM WAS FILED.

The exercise of legislative prerogative in which the CAFC below engaged to recast the will of Congress with respect to the EAJA is even more apparent in its mishandling of Petitioner's claim for interest. Although arguing that the doctrine of sovereign immunity requires a strict construc-

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29. See above at Notes 17 and 18.

30. See above at Notes 14 and 15.

tion of the words Congress used, the majority proceeded instead to read into Section 12 of the CDA cross-references to other requirements which it expressly does not contain.[31] Whatever else may have been the purpose of the certification requirement introduced on the floor of the Senate to appease Admiral Rickover,[32] it cannot reasonably be tied to the starting date for interest, as Judge Baldwin cogently stated with an eloquence Petitioner cannot match here.[33]

Unlike the situation in *U.S.* v. *N.Y. Rayon Importing Company, Inc.*,[34] upon which the majority relied, there is present in Section 12 of the CDA both express and unambiguous language providing for the payment of interest, and the period over which it is to be calculated.[35] There is no reason why the majority needed to drag in the red herring of certification, together with all the confusion which the CAFC's promotion of that

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31. Appendix A, at A7.

32. See *Paul E. Lehman, Inc.* v. *U.S.*, 230 Ct.Cl. _____, 673 F.2d 352 (1982) and the legislative history there cited. See also House Report 97-47 at 3, commenting on H.R. 1371 (May 18, 1981) regarding the intent of Congress concerning the starting point for interest calculations.

33. Appendix A, at A16 to A20.

34. 329 U.S. 654.

35. 41 U.S.C. §611.

concept has created.[36/] In his minority dissent, Judge Baldwin stated the correct view that Section 12 of the CDA means just what it says, and that Petitioner is entitled to the additional interest it now seeks.[37/]

This is an issue of exceptional importance, and one that needs prompt resolution by this Court. The remedies afforded contractors under the CDA to obtain relief when disputes arise generally involve monetary relief and the award of interest over the period during which the claim is under consideration. The confusion the CAFC has engendered in this case and others over the meaning of "certification" and its relation to the payment of interest has left all who do business with the Government without clear guidelines on how the CDA is supposed to be applied. Indeed, when the only Court to which Government contractors can normally turn has now ruled that

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36. As of the date of Petitioner's motion for reconsideration *en banc* at the CAFC, some 42 separate cases had been litigated at the agency Boards of Contract Appeals attempting to follow the CAFC's instructions on certification under the CDA. Since that date, numerous other decisions have been rendered by the CAFC on this issue, leaving the entire Federal contracting community perplexed as to the appropriate function of certification under the CDA.

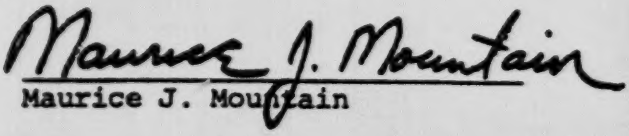
37. Appendix A, at A16.

the interest provisions of the CDA do not mean what Congress had literally and unambiguously stated in the Act, the time has come for this Court to exercise its supervisory authority to restore some semblance of order and predictability to the Federal contract disputes process.

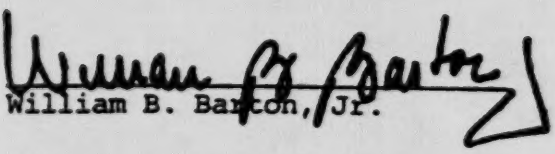
CONCLUSION

For these reasons it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,



Maurice J. Mountain



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June 15, 1983

FIDELITY CONSTRUCTION COMPANY, Appellant,

v.

The UNITED STATES, Appellee.

Appeal No. 27-82.

United States Court of Appeals, Federal Circuit.

Feb. 18, 1983.

Maurice J. Mountain, McLean, Va., argued for appellant. With him on the brief were William B. Barton, Jr. and Brown, Younger & Padoul, P.C., McLean, Va.

Robert G. Gierz, Washington, D.C., argued for appellee. With him on the brief was J. Paul McGrath, Asst. Atty. Gen., Washington, D.C.

Before FRIEDMAN, NICHOLS, and BALDWIN, Circuit Judges.

NICHOLS, Circuit Judge.

This is an appeal from a decision of the Department of Transportation Contract Appeals Board (board) which found that appellant was not entitled to attorney fees under the Equal Access to Justice Act, Pub.L. No. 96-481, 94 Stat. 2325, 28 U.S.C. § 2412 (Supp. V 1981) (EAJA), and which also found that appellant was entitled to interest on its claims under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* (Supp. V 1981), (CDA), from the date it submitted a claim reasonably reflective of the actual dollars and efforts expended due to the causes alleged. *Fidelity Construction Co.*, 82-1 B.C.A. ¶ 15,633. We affirm, but on different grounds than the board gave.

I

Appellant, Fidelity Construction Company (Fidelity), was awarded a contract for a VICON experimental lighting system at Bradley International Airport in Windsor Locks, Connecticut, by the Federal Aviation Administration (FAA) on April 19, 1979. The specification required the construction of signal lights along the length of three runways, together with underground electrical cables to connect these lights with the control tower, in accordance with FAA specifications. The contract was not a lump sum fixed price contract, as 13 of the 20 bid items called for the submission of unit prices on the basis of an estimated quantity stated for each item. The parties used an estimated contract price of $176,999.99 for accounting and budgeting purposes.

Disputes arose between the parties during performance of the contract culminating in a 25 item claim totaling $237,348.12, which was filed with the contracting officer on October 26, 1979. Fidelity subsequently revised its claim on three separate occasions: revisions on November 15, 1979, November 30, 1979, and again on January 23, 1980, brought the total claim to approximately $251,000. The final decision of the contracting officer, dated March 28, 1980, found that Fidelity had supported $37,648.29 of the total amount claimed, but denied the claim in its entirety because of the belief that fraud was involved in its submission.

Fidelity appealed the final decision of the contracting officer to the board. At a pretrial conference, the board advised Fidelity and the contracting officer that the certification requirement had not been met. After the docketing of the appeal to the

board, by letter dated May 29, 1980, addressed to the contracting officer, Fidelity, having retained present counsel, submitted a revised claim totaling $257,066. This revision was the first and only revision that was certified as required by section 6(c)(1) of the CDA. The certified claim was submitted to the contracting officer and the board. The contracting officer did not alter his position on the claim, and Fidelity proceeded with its appeal.

Fidelity's presentation at the board hearing sought $308,475. After completion of the hearing, the board determined that Fidelity was entitled to $199,032.99 for items priced by contract schedule and $121,740.05 in equitable adjustments resulting in a final contract price of $320,773.04 "plus interest on hitherto unpaid amounts, computed in accordance with the Contract Disputes Act from the date of filing of the certified claim, May 19, 1980,[1] until payment, on those amounts not previously paid." *Fidelity Construction Co.*, 81-2 B.C.A. ¶ 15,345 at 76,018.

Fidelity filed a Motion for Reconsideration requesting both an award of attorney fees under the EAJA and an award of interest from October 26, 1979, the date of the initial submittal of the claim, rather than the date of the filing of the certified claim. The board held that the EAJA did not authorize the board to award fees earned by services before October 1, 1981. Since the fees sought by Fidelity were all incurred prior to that date, the board dismissed the motion.

1. There appears to be a discrepancy in the board's decision concerning the date of the certified claim. Both parties refer to the certification date as May 29, 1980.

The board also found that its initial determination that interest was to be computed from the date of filing of the certified claim must be reconsidered in light of the decision in *Brookfield Construction Co. and Baylor Construction Corp. v. United States*, 661 F.2d 159 (Ct.Cl.1981). The board held that interest would run from "the date on which [Fidelity] first submitted a claim which was not grossly overstated but which in fact was reasonably reflective of the actual dollars and effort expended due to the causes alleged." *Fidelity Construction Co.*, 82-1 B.C.A. ¶ 15,633 at 77,226. This was the certified claim.

II

We shall first consider the issue of the date on which interest under the CDA will begin to run on a post-CDA contract claim.

At the initial hearing, the board undertook to analyze each of the claim items submitted by the contractor before certification, and to show they were so grossly inflated as not to be a proper basis for a settlement. Apparently they were prepared in the old manner, so objected to by Admiral Rickover, with little relation to facts and intended only as a starting point for bargaining. *See Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787 & S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 27 (1978).* (Testimony of Adm. Hyman G. Rickover, Deputy Commander, Nuclear Power Directorate, Naval Sea Systems Command.)

The contractor's first actual notice of the certification requirement was apparently also its first awareness of its need for properly substantiated claims. Thus the certification requirement served exactly the purpose for which it was intended. The origi-

nally filed claims were not so much in excess of the amount later approved by the board, but they overstated some items and failed to mention others. The parties have debated before us the relevance of these facts. Since, however, the certification requirement is jurisdictional, it would not have made any difference if the original claims had, except for the absence of certification, been in perfect order. The discussions and arguments critical of the original claims are, therefore, irrelevant, and for reasons discussed below, the board was right the first time in holding, without qualification, that interest did not start to run before certification.

[1] An allowance of interest on a claim against the United States, absent constitutional requirements, requires an *explicit* waiver of sovereign immunity by Congress. Such express consent to the payment of interest must be found in either a specific statutory or an express contractual provision. *United States v. N.Y. Rayon Co.*, 329 U.S. 654, 658-59, 67 S.Ct. 601, 603-604, 91 L.Ed. 577 (1947); *Bromley Contracting Co. v. United States*, 596 F.2d 448, 450 (Ct.Cl. 1979). *See* 28 U.S.C. § 2516(a). The intent by Congress to permit the recovery of interest cannot be implied. Moreover, if an express consent is found in a statute or contractual provision, it must be strictly construed. *United States v. N.Y. Rayon Co.*, 329 U.S. at 659, 67 S.Ct. at 604.

The Contracts Disputes Act of 1978 contains the specific statutory consent to the payment of interest and governs the claim at bar. Section 12 of the CDA provides:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting of-

> ficer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

Fidelity argues that the language of the interest provision is unambiguous in providing for interest on a claim submitted under section 6(a) and that the certification requirement is irrelevant. Fidelity contends that certification is merely intended to establish a date by which the contracting officer is obligated to act on a claim. Fidelity also argues that the legislative history of the CDA and the *Brookfield* decision established that there is no relationship between the interest provision and the certification requirement. We cannot agree.

[2] As a general proposition, we would say that a waiver of sovereign immunity, or consent to be sued, or to the creation of money liability by judgment of a court, is construed by rules peculiar to itself. Not only may the consent not be implied, but even a seemingly explicit consent will not be effective if the language used appears too sweeping and contrary to the overall statutory scheme as judicially deduced.

An example of this is found in the history of the original Tucker Act, 24 Stat. 505, Act of March 3, 1887. It consented to suit on "[a]ll claims founded upon * * * any contract * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable," yet it was soon held that the "equity" language meant only use of equitable doctrines in suits at law for money, and did not encompass suits for specific

performance of contracts, then a typical branch of equity jurisprudence. *United States v. Jones*, 131 U.S. 1, 9 S.Ct. 669, 33 L.Ed. 90 (1889). The reason stated was that the whole statutory machinery, considered all together, justified a doubt whether Congress intended to confer jurisdiction upon courts to order the executive branch to perform contracts. This case is still cited and is still good law today respecting the scope allowed to equity jurisprudence in contract actions. For this reason we do not think any conclusion can be drawn from the fact that section 12, quoted *supra*, cross-references to section 6(a) and not section 6(c) which requires the certification. If it indicates at all that Congress intended that interest should start without certification, it does so only in the most ambiguous manner, or at most, only by implication which is not enough. Such a construction cannot possibly stand as against the entire statutory scheme, which is so obviously to the contrary. It would be anomalous for one to base a claim on the Contract Disputes Act and yet be allowed to ignore a basic requirement of the law claimed upon.

[3, 4] Moreover, the statutory mandate that all claims over $50,000 must be certified is one of the most significant provisions of the CDA. The importance Congress ascribed to the certification requirement as a mechanism to discourage the submission of unwarranted claims and encourage prompt settlements was fully discussed in *Lehman v. United States*, 673 F.2d 352 (Ct.Cl.1982) and need not be repeated here. Suffice to say that certification is not a mere technicality to be disregarded at the whim of the contractor, but is an unequivocal prerequisite for a post-CDA claim being considered

under the statute. The CDA "requires that to be valid a claim must be properly certified." *Folk Construction Co. v. United States*, Ct.Cl. No. 99–80C (order entered January 16, 1981). Unless that requirement is met, there is simply no claim on which a contracting officer can issue a decision. *Skelly & Loy v. United States*, 685 F.2d 414 (Ct.Cl.1982). The submission of an uncertified claim, for purposes of the CDA, is, in effect, a legal nullity and therefore no interest can accrue.

The allowance of interest from the date of the filing of an uncertified claim would be inconsistent with the Congressional purpose because it would eliminate an important incentive for contractors to certify claims. The fact that a contractor cannot obtain interest upon an allowed claim unless it is certified is a compelling reason for contractors to certify all claims before filing them.

[5] The legislative purpose of the interest provision of the CDA provides additional support for the conclusion that interest cannot accrue on an uncertified claim. Congress was concerned with fully compensating contractors for additional costs incurred in a continuing performance under a contract. An award of interest on amounts found due on contract claims will, of course, further the congressional intent to fully compensate the contractor. On the other hand, the interest provision provides an "additional inducement for the settlement of claims short of litigation." *Brookfield*, 661 F.2d at 164. The interest provision was designed to serve as a catalyst and a monetary incentive to the contracting officer to expedite consideration of contract claims. *Id.* at 164–65. But a contracting officer has authority to decide only properly submitted "claims", and an uncertified claim is not a

"claim" that has been "properly submitted" to the contracting officer for a decision *Skelly & Loy v. United States*, 685 F.2d at 419. To allow interest to accrue on a claim on which the contracting officer has no authority to issue a decision would not only be absurd, but would compensate a contractor for delaying the settlement of the contract claim.

We note further that the interest provision was amended on motion of the chairman of the reporting committee shortly before final passage. Previously it had allowed interest from the time the claim "first accrued," not when it was filed with the contracting officer. At the same time and in the same way, the certification requirement was added. 124 Cong.Rec. 36260–36268 (1978). It is necessary to note this because it makes irrelevant statements in earlier legislative history (*see* 1978 U.S. Code Cong. & Ad.News 5235, 5266) which discussed the interest provision as it then was.

This decision does not conflict with the holding in *Brookfield*. In that case, our predecessor court held that interest on contract claims filed with the contracting officer before the effective date of the CDA (March 1, 1979), but decided by the contracting officer after that date, are recoverable from the effective date of the CDA until the date of payment of the underlying claims. The issue whether a contractor may recover interest on uncertified claims submitted after the effective date of the CDA was not decided. 661 F.2d at 166, n. 19. The contract claims in *Brookfield* were "properly submitted" to the contracting officer under the then-existing law and we found no statutory mandate to apply the certification requirement retroactively. In the instant case, the claim was not "properly

ly submitted" to the contracting officer until it was certified in accordance with the CDA.

We affirm the board's decision that interest did not begin to run on the underlying claim until May 29, 1980, but do so on the ground that this was the date the claim was certified and thus "properly submitted" to the contracting officer for decision.

III

We now turn to the question whether a contractor who prevails on its claim before a board of contract appeals may by it be awarded attorney fees under the EAJA. As mentioned previously, the board dismissed Fidelity's motion for attorney fees because of its belief that it did not have authority to award fees incurred prior to October 1, 1981. We need not reach the issue of the retroactivity of the EAJA [2] in this situation, because we hold that the board of contract appeals is without jurisdiction to award fees under this Act retroactively or prospectively applied.

2. One provision of the EAJA states that a party "dissatisfied with the fee determination" of an agency "may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial." 5 U.S.C. § 504(c)(2) (Supp. V 1981).

Fidelity did not petition either the Court of Claims or this court for leave to appeal the board's decision denying attorney fees. This is a new statute, however, and at oral argument Fidelity requested that we treat its appeal as embodying a request for leave to appeal. We do so in this case. In the future, however, we shall apply the statute in accordance with its terms and shall not entertain any appeal from an agency fee determination unless we first have granted leave to appeal.

[6, 7] We begin our analysis of the board's authority to award attorney fees against the United States, as we did in our analysis of the authority to award interest against the United States, by stressing that the doctrine of sovereign immunity must be overcome before there can be an award of such attorney fees. To overcome this doctrine, we must therefore find specific statutory language that *expressly* authorizes such an award. *Nibali v. United States*, 634 F.2d 494, 497 (Ct.Cl.1980), and cases cited therein. The waiver of sovereign immunity must be unequivocally expressed. Neither this court nor any agency is authorized to award attorney fees against the United States by mere implication or by "negative inference."

Fidelity argues that a broad congressional waiver of sovereign immunity for an award of attorney fees and expenses is embodied in the EAJA. Although the EAJA lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, it does so only to the extent explicitly and unequivocally provided. If the EAJA empowered the board of contract appeals to award attorney fees, we would find this grant of authority in a specific statutory provision of that Act. We cannot expand by implication the list of forums which are authorized to award fees under the EAJA.

[8] Fidelity first argues, somewhat timidly, that the proceeding before the board of contract appeals has evolved into an administrative adjudication governed by the Administrative Procedure Act (APA). Fidelity thus contends that the board derives its authority to award attorney fees under section 203 of the EAJA. 5 U.S.C. § 504(a)(1). Section 203, however, only authorizes the award of attorney fees in those adversary adjudications, whatever they are, that are subject to 5 U.S.C. § 554. In enacting the CDA, Congress explicitly stated that a board of contract appeals proceeding is not subject to the adjudicative procedure

of 5 U.S.C. § 554. *See* S.Rep. No. 95–1118, 95th Cong. 2d. Sess., *reprinted in* 1978 U.S. Code Cong. & Ad.News, 5241, 5249. We have no difficulty concluding that section 203 of the EAJA does not provide statutory authority for a board of contract appeals to award attorney fees.

Fidelity next argues that the language of section 204, 28 U.S.C. § 2412(d)(3), renders the EAJA directly applicable to proceedings before the board of contract appeals. It provides:

> In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Under this section, the court may award fees for service before a board only when it also awards fees for service before itself. *Broad Avenue Laundry and Tailoring v. United States*, 693 F.2d 1387 (Fed.Cir.1982). Fidelity contends that Congress must have intended the board to award attorney fees under the EAJA; otherwise the reference to the CDA would be meaningless, for the court would be left with nothing to review when the claimant prevailed before the board.

[9] This interpretation misconstrues the express provision of the section and attempts to imply by negative inference a statutory authority which does not exist.

Section 204 authorizes a *court* to award fees and expenses in reviewing CDA or specific APA proceedings. The "judicial review of an adversary adjudication" is that of the final decision of the administrative agency under the APA or, as in this case, the final decision of the board of contract appeals. There is no express language in section 204 granting the board of contract appeals the authority to award fees and expenses against the United States and no such authority will be implied. It is at least possible that Congress wrote this provision in this manner in order to deter the government from appealing board decisions adverse to it. This provision may therefore be meant to apply to CDA cases only when the contractor loses before the board but wins on court review.

We understand appellee will argue in an appropriate case, that the Claims Court does not have this authority to award fees. We do not make any assumption as to this question one way or the other.

Had Congress intended board of contract appeals to independently award attorney fees and expenses, it should have included statutory language expressly so providing to satisfy the strict construction standard. An early version of the EAJA, H.Rep. No. 6429, clearly permitted the award of attorney fees and costs in agency adjudications under both § 554 of the APA, and § 605 of the CDA. *See Federal Contracts Report*, No. 837, June 23, 1980, at A–16. Moreover, the only pertinent amendment to H.Rep. No. 5612, the bill which became Pub.L. No. 96–481, 94 Stat. 2321, was that which allowed a court to award attorney fees and expenses in reviewing CDA proceedings; proposed amendments expressly allowing a board of contract appeals independently to award attorney fees were defeated. *See*

Federal Contracts Report, No. 861, December 15, 1980, at A-8.

Finally, Fidelity suggests that the EAJA must be interpreted in a manner that furthers the legislative purpose of the CDA—that is, to provide a prompt, efficient, and less costly remedy of contract disputes through board adjudications. To this end, Fidelity contends that the EAJA may be applied to the board through section 8(d) of the CDA, which states that "the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." 41 U.S.C. § 607(d). Although this argument is attractive and has been, in fact, successful in some board proceedings, we are not persuaded.

The decisions Fidelity cites in support of this proposition were rendered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25 (FCIA). *See e.g., Brand S. Roofing*, 82-1 B.C.A. ¶ 15,717. We are aware of no post-FCIA decisions on this point. It seems that if a board now tried to apply the EAJA through section 8(d) of the CDA with the rationale that the present Claims Court is empowered to award attorney fees under the EAJA, our reasoning here would apply and such an application would be in error. Appellee, however, does not even concede that the Claims Court has any authority under the EAJA. Again, we do not make any assumption regarding what powers the Claims Court inherits from the Court of Claims or whether the Claims Court has the authority to award attorney fees.

Section 8(d) of the CDA was a floor amendment inserted to provide adequate authority to resolve breach of contract

claims at the agency level. Nothing in the legislative history of the EAJA suggests that Congress intended this general provision of the CDA to take precedence over its specific determinations respecting the powers of boards to award fees.

[10, 11] As we noted previously, Congress must expressly authorize an award of fees against the United States with specific statutory language. In construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress. It is an error to suppose that the ordinary canons of statutory construction are to be applied in this context, if they would add anything to what Congress has expressly said. Where, as here, a party's argument is "hopelessly dependent on implication and negative inferences," it ultimately must fail. *Nibali v. United States*, 634 F.2d at 497. The thrust of the Supreme Court's most recent decision, *United States v. Erika*, 456 U.S. 201, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982), is that broad and general language which might be construed as consenting otherwise, will not be so construed when Congress has elsewhere specified how and to what extent it consents to the specific liability to be enforced, or refuses consent.

[12] In summary, the EAJA does not authorize boards of contract appeals to award attorney fees and expenses against the United States, and, for this reason, the board's dismissal of Fidelity's motion for attorney's fees and expenses is affirmed.

AFFIRMED.

BALDWIN, Circuit Judge, dissenting.

I dissent from the holding that interest accrues from the date a claim is certified. This ruling amends clearly drafted statutory language that marks the accrual of interest from the date a claim is submitted in writing and is, moreover, contrary to the purpose of the statute's interest provision. The majority justifies its exercise of legislative prerogative by stating that when a statute consents to the collection of interest on claims against the government, "[n]ot only may the consent not be implied, but even a seemingly explicit consent will not be effective if the language used appears too sweeping and contrary to the overall statutory scheme as judicially deduced." In fact, the language of the Contract Disputes Act (CDA) regarding the date from which a contractor is entitled to interest, is neither ambiguous nor contrary to the statutory scheme intended and enacted *by Congress*.

The interest provision of the CDA could not have been written more clearly to begin the accrual of interest from the date a claim is submitted. In mandatory terms, it says:

> Interest on amounts found due contractors on claims *shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a)* of this title from the contractor until payment thereof * * *.

41 U.S.C. § 611 (Supp. V 1981) (emphasis added). Section 605(a) requires all claims to be submitted to the contracting officer in writing. Neither the interest provision nor section 605(a) refer to certification. Certification is made a requirement only for claims exceeding $50,000 by section 605(c) of the CDA.

The explicit language making interest run from the date a written claim is submitted to the contracting officer, rather than the date a claim is certified, implements the full measure of Congressional intent. The Senate report accompanying the CDA explains that Congress wanted to fully compensate contractors for the cost of money needed to finance continued performance after disputes arise and the contractors pursue their remedies through administrative and judicial channels. The drafters of the CDA expressed their purpose in the following way:

> The rights of Government contractors who prevail on claims against the Government are unique since they have been required by language of the contract, for example, the changes article and the disputes article, to perform the work as directed by the Government without stopping to litigate. Thus, *Government contractors must perform and then argue about the amount of the equitable adjustment at some later time.* Since the contractor has been compelled to perform the work with its own money—in the total absence of contract payments or progress payments—there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. *The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.*

S.Rep. No. 95–1118, 95th Cong., 2d Sess., 1978 U.S.Code Cong. & Ad.News 5235, 5266 (emphasis added). When presented to Congress, the bill began interest from the date a claim accrued, an even earlier date than

the date a claim is submitted. To address concern that determinations of when a claim accrues would be too difficult, the interest provision was amended to mark the beginning of interest from the date a claim is submitted in writing. 124 Cong.Rec. 36261, 36267 (1978). The change provided a more easily discerned date on which interest begins but did not change the purpose of the interest provision.

The majority finds a conflict between compensating contractors with interest from the date a claim is submitted and the certification requirement of the CDA. These two requirements of the statute, however, do not conflict with each other, but achieve distinct, unrelated purposes.

Certification assures a contracting officer that the claim is made in good faith and that the supporting data is accurate and complete. With this assurance of a good faith claim based on accurate supporting data, the contracting officer is better equipped to settle cases rather than forcing contractors to prove their claims in litigation. Before a claim can be certified the contractor must review carefully his books and records. This may take days, weeks, or months, depending on the complexity of the claim and the integrity of the contractor's records. Amending the statute to tie the accrual of interest to the date a claim is certified, rather than to the date it is submitted in writing, needlessly pressures contractors to hurry certification of their claims. This pressure undermines the very accuracy certification was designed to provide and cannot be justified by a desire to eliminate unfounded claims. Contractors face an array of statutory sanctions which carry significant civil and criminal penalties

for false claims.* In fact, the CDA contains a separate provision, supplementing these statutes, tailored to discourage unfounded claims. Under this provision of the CDA, contractors who are unable to support portions of their claim because of misrepresentation of fact or fraud, are made liable to the government for the unsupported part of the claim in addition to all costs to the government attributable to the cost of reviewing the unfounded part of the claim. 41 U.S.C. § 604 (Supp. V 1981). Contractors facing the serious consequences that may attend false claims against the government should not be prodded into hurrying the certification process by amending the CDA to deny them interest expressly granted by the statute.

The majority reasons that allowing interest to accrue before a claim is certified would compensate a contractor for delaying settlement of a claim. This assumes that contractors would consider leaving money in the government's hands, where it collects interest, as preferable to having the money in their own hands as soon as possible. Actually, a contractor has every economic incentive to certify a claim promptly to speed his receipt of money claimed. When

* 31 U.S.C. § 231 (1976) (civil penalties provided for knowingly false, fictitious, or fraudulent claims); 18 U.S.C. §§ 286, 287, 1001 (1976) (civil and criminal penalties provided for activities involving knowingly false, fictitious or fraudulent claims and concealment of material information).

the money is in the contractor's hands he can get as good an interest rate as the government gives, or he can put the money to some more urgent or productive use. From the contractor's perspective, delaying certification would have no economic benefit and may be economically irresponsible.

The Court of Claims decision in *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct.Cl.1982), relied on by the majority, does not provide authority for amending the interest provision. *Lehman* holds only that a contracting officer's decision must be made on a certified claim before the Court of Claims has jurisdiction to review the contracting officer's decision. The present case concerns only the date from which a contractor is entitled to interest, not jurisdiction or the reviewability of a contracting officer's decision. *Lehman* has no bearing on when interest begins on a claim over which this court has jurisdiction. The date from which a contractor gets interest is independent of certification or jurisdictional prerequisites or procedural requirements of the CDA.

I would give contractors interest from the date claims are submitted in writing to compensate them in accordance with the statute's express requirements and the intent of Congress.

APPENDIX B

United States Court of Appeals for the Federal Circuit

FIDELITY CONSTRUCTION COMPANY, INC., Petitioner, v. THE UNITED STATES, Respondent.) No. 27-82

ORDER

A suggestion for rehearing en banc and a petition for reconsideration having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby, Denied.

FOR THE COURT:

Clerk

March 17, 1983
Date

APPENDIX C

§ 605. Decision by the contracting officer

(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c)(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(Nov. 1, 1978, P.L. 95-563, § 6, 92 Stat. 2384.)

Office-Supreme Court, U.S.
FILED
AUG 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2060

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIDELITY CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether interest on amounts awarded by agency contract appeal boards under the Contract Disputes Act of 1978 runs only from the date the claim is properly certified under the Act rather than from the date an improper, uncertified claim is filed.

2. Whether the Equal Access to Justice Act authorizes the award of attorneys' fees by agency contract appeal boards established under the Contract Disputes Act of 1978.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 5

Fidelity Construction Co., 82-1 B.C.A. (CCH) para. 15,633 3

Folk Construction Co. v. *United States*, No. 99-80C (Ct. Cl. Jan. 16, 1981) 4

Paul E. Lehman, Inc. v. *United States*, 673 F.2d 352 4

Ruckelshaus v. *Sierra Club*, No. 82-242 (July 1, 1983) 5

Skelly & Loy v. *United States*, 685 F.2d 414 4

United States v. *King*, 395 U.S. 1 6

United States v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 4

United States v. *Testan*, 424 U.S. 392 6

Page

Statutes:

Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 601 *et seq.* :

Section 6(a), 41 U.S.C. (Supp. V) 605(a) 4
Section 6(c), 41 U.S.C. (Supp. V) 605(c) 2
Section 8(d), 41 U.S.C. (Supp. V) 607(d) 6
Section 12, 41 U.S.C. (Supp. V) 611 4

Equal Access to Justice Act:

5 U.S.C. 504(a)(1) 5
5 U.S.C. 504(b)(1)(C) 5
28 U.S.C. (Supp. V) 2412(d)(3) 5, 6

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 6

5 U.S.C. 554 5

Miscellaneous:

S. Rep. No. 95-1118, 95th Cong., 2d Sess. (1978) 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 700 F.2d 1379.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1983. A petition for rehearing was denied on March 17, 1983 (Pet. App. B). The petition for a writ of certiorari was filed on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In April 1979, petitioner was awarded a contract by the Federal Aviation Administration to install an experimental runway lighting system at Bradley International Airport in Windsor Locks, Connecticut (Pet. App. A2). Petitioner and the FAA had several disputes during the performance of the contract. As a result, on October 26, 1979, petitioner filed a

25-item claim totalling $237,348.12 with the FAA's contracting officer (*ibid.*). This claim was revised on November 15, 1979, revised again on November 30, 1979, and revised a third time on January 23, 1980, at which time the claim stood at approximately $251,000 (*ibid.*). The FAA contracting officer found that petitioner had supported only $37,648.29 of the total amount of the claim, but he denied the claim in its entirety because he believed that fraud was involved in its submission (*ibid.*).

Petitioner appealed this decision to the Department of Transportation Board of Contract Appeals. At a pretrial conference, the Board advised both petitioner and the contracting officer that petitioner's various claims had not been submitted in compliance with the certification requirement of Section 6(c) of the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. (Supp. V) 605(c). That section requires a claimant seeking more than $50,000 to certify that:

> the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

None of petitioner's first three submissions had been certified.

On May 29, 1980, petitioner submitted its first certified claim, which totalled $257,066 (Pet. App. A3). Petitioner's appeal to the Board resulted in a final award of $320,773.04 "plus interest on hitherto unpaid amounts, computed * * * from the date of filing of the certified claim, May 19, 1980, until payment * * *" (*ibid.*).[1]

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[1]The May 19, 1980 date appears to have been a clerical error. Both petitioner and the government agree that the certified claim was filed on May 29, 1980 (Pet. App. A3 n.1).

On October 30, 1981, petitioner, in a motion for reconsideration to the Board, asked that interest be awarded from the date petitioner filed its first uncertified claim, October 26, 1979, rather than from the date of its first and only certified claim, May 29, 1980. Relying on the Equal Access to Justice Act ("EAJA"), petitioner also requested an award of attorneys' fees and expenses incurred during its litigation before the Board (Pet. App. A3).

The Board denied petitioner's claim for additional interest, stating that "interest does not run on a claim which is patently and grossly inaccurate * * * until such time as the claimant corrects the inaccuracies." *Fidelity Construction Co.*, 82-1 B.C.A. (CCH) para. 15,633, at 77,225 (1982). The Board found that such a qualifying claim had not been submitted until the certified claim was filed. *Id.* at 77,226. The Board denied attorneys' fees based on its conclusion that the EAJA does not authorize recovery of fees and expenses incurred prior to the October 1, 1981 effective date of the Act. *Id.* at 77,229.

The court of appeals affirmed the Board's rulings (Pet. App. A1-A20). On the question of interest, the court ruled that an uncertified claim for over $50,000 is a "legal nullity" under the CDA and that only a certified claim for such a sum could cause interest to accrue (Pet. App. A8). The court also ruled that the Board of Contract Appeals lacked jurisdiction to award attorneys' fees under the EAJA, whether incurred before or after October 1, 1981 (*id.* at A10).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any other judicial decision. Review by this Court is therefore unnecessary.

1. An allowance of interest on a claim against the United States, absent constitutional requirements, requires an explicit waiver of sovereign immunity by Congress. Such a waiver must be found either in a specific statutory provision or in an express contractual stipulation. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947).

Section 12 of the CDA, 41 U.S.C. (Supp. V) 611, provides for interest "from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof." Section 605(a) of Title 41 (Supp. V) requires all claims against the government to be submitted in writing to the contracting officer for a decision. The Court of Claims has ruled previously that "unless a claim has been properly certified, it cannot be considered under the statute," *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352, 355 (1982), and that " 'to be valid a claim must be properly certified.' " *Ibid.*, citing *Folk Construction Co.* v. *United States*, No. 99-80C (Ct. Cl. Jan. 16, 1981). Unless that requirement is met and the claim has been properly submitted, the claim is invalid, and no "decision" is possible under 41 U.S.C. (Supp. V) 605(a). *Skelly & Loy* v. *United States*, 685 F.2d 414, 416 (Ct. Cl. 1982). If no decision is possible on the basis of the submission, then the provision for interest contained in 41 U.S.C. (Supp. V) 611 has not been triggered and interest cannot begin to accrue.[2]

Petitioner contends that the question whether interest accrues on an uncertified claim is "of exceptional importance" and is causing "confusion" for government contractors (Pet. 24). Any such confusion would be totally obviated

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[2]The fact that the contracting officer considered several of petitioner's uncertified claims is irrelevant because contracting officers have "no authority to waive a requirement that Congress imposed." *Paul E. Lehman, Inc.* v. *United States, supra*, 673 F.2d at 356.

if contractors simply certified all claims over $50,000, as required by law. There is thus no need for the Court to review this issue.

2. The court of appeals' determination that a board of contract appeals may not award attorneys' fees under the Equal Access to Justice Act is firmly based in the language of the statute itself. Attorneys' fees for non-judicial proceedings are governed by Section 203(a)(1) of the EAJA, 5 U.S.C. 504(a)(1). That Section permits attorneys' fees to be awarded only by "[a]n agency that conducts an adversary adjudication" (5 U.S.C. 504(a)(1)). "Adversary adjudication" is defined as "an adjudication under section 554 of this title" (5 U.S.C. 504(b)(1)(C)). Proceedings before boards of contract appeals, however, unquestionably are not adjudications under 5 U.S.C. 554. As explained in the Senate Report on the CDA (S. Rep. No. 95-1118, 95th Cong., 2d Sess. 15 (1978)):

> Agency boards of contract appeals * * * are not subject to the adjudication procedures of the Administrative Procedure Act (5 U.S.C. 554). This is plain from the text of section 5 of the act (5 U.S.C. 554) and the further explanation in the Senate Judiciary committee Print, June 1945, pages 21-22, where money claims are specifically excluded.

Because boards of contract appeals are thus not authorized to pay attorneys' fees under the EAJA, and because the EAJA is the only basis alleged by petitioner for an award of attorneys' fees, sovereign immunity must bar the award of such fees. See *Ruckelshaus* v. *Sierra Club*, No. 82-242 (July 1, 1983), slip op. 5; *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 & n.42 (1975).

Section 204(a) of the EAJA, 28 U.S.C. (Supp. V) 2412(d)(3), clearly authorizes a court to award attorneys' fees and expenses to a prevailing party in an action for

judicial review of adversary adjudications under the CDA and further provides that the *court* may also award fees incurred during the earlier administrative adjudication. As the court of appeals correctly noted, however, this provision contains not the slightest suggestion that the boards themselves may award attorneys' fees incurred as a part of the administrative process (Pet. App.A12-A13). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969), and therefore 28 U.S.C. (Supp. V) 2412(d)(3) cannot authorize payment of a fee award here.

Petitioner attempts to avoid the specific limitations of the EAJA by relying (Pet. 14) on Section 8(d) of the CDA, 41 U.S.C. (Supp. V) 607(d). That provision grants specified jurisdiction to boards of contract appeals "to decide any appeal" from certain decisions of contracting officers. It further provides that, "[i]n exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."

Petitioner cites nothing, however, to suggest that Congress intended this provision of the CDA, written in 1978, to supersede by inference Congress' subsequent specific provisions for the award of attorneys' fees under the EAJA. Petitioner offers no support for defining "relief" in 41 U.S.C. (Supp. V) 607(d) to include attorneys' fees, which were not available in the Court of Claims in 1978.[3] Additionally, there is no indication in the CDA that the boards'

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[3]The term "Court of Claims" in Section 8(d) is also unclear in light of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. If that term is interpreted to refer to the new Claims Court, then petitioner's case is made even more difficult because it is not clear that the Claims Court has authority to award attorneys' fees (see Pet. App. A13-A14).

jurisdiction extends beyond deciding appeals from decisions of contracting officers to include ruling on issues such as attorneys' fee claims that were not raised before those officers. The court of appeals, by affirming the Board's denial of attorneys' fees, thus has given full effect to the language of the CDA without enlarging the specific legislative grant of authority in the EAJA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

DOJ-1983-08